

# **APPENDIX W: Guidance on the Disclosure of Confidential Information by Members**

## **Introduction**

As a Member you will have access to a great deal of information which is confidential, either because it is personal information or because it is commercially sensitive or it is information which would not otherwise be placed in the public domain.

The handling of confidential information is an essential element in the relationship of trust that should exist between Members, Officers and the public and the mishandling of such information and/or its accidental or deliberate disclosure is likely to damage trust as well as lead to formal proceedings being taken against the Council, individual Members or Officers.

The Council is committed to the principles of openness and transparency. However, in the practical application of these principles, you need to have regard to legal obligations which, in some cases, may require information to be kept confidential.

## **What is Confidential Information**

In order to ascertain whether information is confidential, it is important to understand what is meant by a duty of confidence and how confidentiality can be established.

A duty of confidence arises when one person (the 'confident') is provided with information by another (the 'confider') in the expectation that the information will be used or disclosed only in accordance with the wishes of the confider. This is generally known as the common law duty of confidence.

There are various ways in which a person or the Council may be under a duty of confidentiality (either explicitly or implied), for example:

- a) if the relationship is inherently confidential e.g. between client and lawyer.
- b) if the relationship is personal e.g. it is between colleagues in circumstances that suggest an expectation of confidentiality.
- c) if the source of the information will be put at risk if identified e.g. whistle blowers.

Confidentiality is unlikely to be established where the information is already known to a wide circle or is in the public domain.

Information which at one time was to be treated as confidential may subsequently cease to be confidential by passage of time or where, in the case of exempt information, the relevant meeting did not resolve to exclude the press and public.

Confidentiality can be agreed either orally or in writing. However, it is not necessary for the person who supplied the information to have stated expressly that the information is confidential. For example, the fact that correspondence is not marked 'confidential' does not necessarily prevent it from being confidential. In many cases, the fact that the

information is confidential may be inferred from the subject matter and the surrounding circumstances.

With the consent of the 'confider', confidentiality can be set aside.

It may be difficult to establish that a confidentiality agreement existed retrospectively. This is especially true if there is little or no evidence of an attempt having been made to restrict or protect the information at the time the information was given. However, as already emphasised some relationships are inherently confidential and in those circumstances, confidentiality may well be implicit, rather than explicit.

## **Types of Confidential Information**

Information in documents held by the Council, belongs to the Council corporately and not to individual Officers or Members.

The Council has policies on data protection, freedom of information and whistle blowing. Other statutory provisions may also be relevant to the disclosure of confidential information. If in doubt you should seek advice from the Legal Section of the Council.

Information may be supplied to the Council by a government department upon terms which prevent its disclosure to the public, or information which by law is prohibited from being disclosed to the public. The public and press may need to be excluded from meetings where such information is being considered.

Information may be exempt under Schedule 12A of the Local Government Act 1972. Under this legislation there are a number of categories and circumstances of exemption such as information about individuals, financial or business affairs of an individual including the Council, trade disputes, legal advice, crime and Standards Committee deliberations etc.

Some Committee Reports may relate to exempt information which remain confidential until a decision is made that it is in the interests of the public to release some or all of the information. In practice, this exercise is undertaken at the time the report is drafted and/or following a specific Freedom of Information or Environmental Information Regulations request.

The public and press may be excluded from a meeting where exempt information is being considered.

It would be a mistake to consider that it is only 'confidential information' or 'exempt information' as defined in the legislation that should be protected from disclosure. Information other than that which is to be discussed at, or is the subject of a report to, a committee meeting may be provided to you in confidence.

Information provided expressly 'in confidence' to you (or similar words used) should be treated as confidential information. An example might include sensitive legal or financial information provided to you by Officers outside the context of a formal committee meeting, or sensitive information provided to you by a constituent.

Generally, the confidentiality or otherwise of information needs to be considered in the context of individual circumstances. However, the following information would normally

be treated as confidential:

- (a) Where there is a legal restriction on the disclosure of information for example under the Data Protection Act 1998, contractual obligations, a court order or pending legal proceedings.
- (b) Exempt Committee Report as identified by the Committee Agendas.
- (c) Where information is supplied to a Member by an Officer or other person in confidence.
- (d) Matters concerning terms and conditions of employment of individual Officers or pending grievance or disciplinary proceedings.
- (e) Matters concerning details of commercial negotiations.
- (f) Personal information concerning an individual.
- (g) Information protected by legal professional privilege.
- (h) Information which, given its nature, timing and context is such that a reasonable person would consider it to be confidential.
- (i) Where the disclosure of information would normally tend to have a detrimental effect on the interests of the Council, the service users or third parties involved.

## **A Member's Right to Information**

The Council has a general commitment to openness. Your access to information and documents is therefore restricted only where there is a good reason for doing so.

You have a common law right to access information on a 'need to know' basis. This entitles you to access information or documents that are reasonably necessary to enable you to discharge your functions as a Councillor. This would cover your role as a member of committees, sub-committees or working groups. As well as positions to which you are appointed by the Council and in the undertaking of your ward Councillor responsibilities. The right is limited to a need to know and a mere curiosity or desire to know is not sufficient. The courts have also held that as a Councillor, you have no right to a 'roving commission' to examine the books or documents of the Council.

One aspect of the need to know principle is proportionality. In asking for information and documents, you need to ensure that what you are asking in terms of volume of documents, time needed to locate, research and collation of information is commensurate to your need to know.

An Officer receiving a request for information from you is entitled to know the reasons why the information is needed so that a proper assessment of the need to know can be made. Where you are dissatisfied with the Officer's response, you may refer the matter to the relevant Chief Officer for a review.

## **When is a Member subject to a duty of confidentiality**

The duty of confidentiality under the Code of Conduct applies only when you are acting in an 'official capacity'. The information must therefore have been received and/or disclosed by you in your role as a Councillor. This should, however, not be interpreted as meaning confidential information which has been received in your role of Councillor, can be disclosed with impunity in a private capacity.

The duty under the Code is not limited to information supplied by Officers or the Council – it also covers information given to you in your capacity as a Councillor, by any person.

## **What Requirements must a Member Comply with under the Code of Conduct?**

The Member Code of Conduct imposes a duty that Members must always comply with relevant laws and have due regard to local codes and protocols in effect from time to time, including this Appendix.

The defined range of circumstances are as follows:

- a) Before disclosing confidential information, you must have the consent of the person authorised to give it. This would normally be the author of the document or the Chief Officer or Head of Service for the area of service. In appropriate cases the Chairman of the relevant committee may need to be consulted.
- b) You may disclose confidential information if you are entitled by law to do so e.g. by a court order.
- c) You may disclose confidential information to a third party e.g. a lawyer for the purpose of obtaining professional advice provided that the third party agrees not to disclose the information to any other person.
- d) The disclosure is in the public interest. This is only justified in limited circumstances, when all of the following four requirements are met:
  - (i) The disclosure must be reasonable
  - (ii) The disclosure must be in the public interest
  - (iii) The disclosure must be made in good faith
  - (iv) The disclosure must be made in compliance with any reasonable requirement of your authority.

The first requirement, that the disclosure must be reasonable, requires you to consider matters such as:

- a) Whether you believe that the information disclosed, and any allegation contained in it, is substantially true. If you do not believe this, the disclosure is unlikely to be reasonable.

- b) Whether you make the disclosure for personal gain. If you are paid to disclose the information, the disclosure is unlikely to be reasonable.
- c) The identity of the person to whom the disclosure is made. It may be reasonable to disclose information to the police or to an appropriate regulator. It is less likely to be reasonable for you to disclose the information to the world at large through the media.
- d) The extent of the information disclosed. The inclusion of unnecessary detail, and in particular, private matters such as addresses or telephone numbers, is likely to render the disclosure unreasonable.
- e) The seriousness of the matter. The more serious the matter disclosed, the more likely it is that the disclosure will be reasonable.
- f) The timing of the disclosure. If the matter to which the disclosure relates has already occurred, and is unlikely to occur again, the disclosure may be less likely to be reasonable than if the matter is continuing, or is likely to re-occur.
- g) Whether the disclosure involves your authority failing in a duty of confidence owed to another person.

#### Points to remember

- You must not disclose confidential information merely to make political capital/gain.
- Disclosure of confidential information to the press is most likely to involve a breach of the Code of Conduct and is rarely justified.
- You should have regard to your fiduciary duty to the Council and council taxpayers and that you have joint responsibility to avoid the disclosure of information of a commercially sensitive nature.
- Confidential information gained by you in connection with pending or ongoing litigation should not be disclosed under any circumstances, as this would amount to a breach of trust.

The second requirement, that the disclosure must be in the public interest, needs to involve one or more of the following matters or something of comparable seriousness, that has either happened in the past, is currently happening, or is likely to happen in the future:

- a) A criminal offence is committed.
- b) Your authority or some other person fails to comply with any legal obligation to which they are subject.
- c) A miscarriage of justice occurs.
- d) The health or safety of any individual is in danger.

- e) The environment is likely to be damaged
- f) That information tending to show any matter falling within (a) to (e) is deliberately concealed.

#### Points to remember

- 'Public interest' has been described as something that is of serious concern or benefit to the public, not merely of individual interest.
- The public interest does not mean 'of interest to the public' but 'in the interest of the public'. The term is not defined in law, so you will need to make a subjective judgement, in which policy and legal interpretations are both involved to some degree
- Because of the implications associated with releasing confidential information e.g. risk to an individual, risk to commercial negotiations etc, any decision to release such information has to be made with great care. In evaluating the effect of disclosing confidential information, it will be necessary for you to consider the full context of that disclosure, and to make a risk assessment of the disclosure.

Therefore:

- (i) Identify the relevant public interest factors;
- (ii) List the factors for and those against releasing the information;
- (iii) Evaluate the relevant public interest factors, e.g. no weight, minimal weight, moderate weight or considerable weight;
- (iv) Determine where the balance lies.

The third requirement, that the disclosure is made in good faith, will not be met if you act with an ulterior motive, for example, to achieve a party political advantage or to settle a score with a political opponent.

#### Points to remember

- The law defines good faith as a state of mind consisting in:
  - (i) honesty in belief or purpose;
  - (ii) faithfulness to one's duty or obligation;
  - (iii) observance of reasonable commercial standards of fair dealing in a given trade or business; or
  - (iv) absence of intent to seek unconscionable advantage.

- In law, the consensus is that someone does something ‘in good faith’ when they do it honestly and with no ulterior motive.

The fourth requirement, that you comply with the reasonable requirements of your authority, mean that before making the disclosure you must comply with your authority’s policies or protocols on matters such as whistle-blowing and this Guidance.

#### Points to remember

- Never allow your party political interests to override the interests of the Council and council tax payers in the way that you deal with access to or the disclosure of confidential information.
- Just because communication is not labelled ‘confidential’, you should not assume that it is for general release. You should always consider the circumstances.
- Do not take risks.

In summary, to decide whether the disclosure is reasonable and in the public interest, you may need to conduct a balancing exercise weighing up the public interest in maintaining confidentiality against any countervailing public interest favouring disclosure. This will require a careful focus on how confidential the information is, on any potential harmful consequences of its disclosure, and on any factors which may justify its disclosure despite these potential consequences.

In some situations, it is extremely unlikely that a disclosure can be justified in the public interest. These will include where the disclosure amounts to a criminal offence, or where the information disclosed is protected by legal professional privilege.

### **General**

This Guidance is meant as a general guide and does not attempt to cover all eventualities. Further advice or clarification can be sought from the Monitoring Officer or the Legal Section.